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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/605,956

11/10/2003

Richard L. Botteri

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38882

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08/31/2006

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EXAMINER

PRATT, HELEN F

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 08/31/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/605,956

Applicant(s)

BOTTERI ET AL.

Examiner

Helen F. Pratt

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1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-13 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 2, 5, 6-10 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 2 is indefinite in the use of the phrase "single serving of 1.4 grams". It is not known what is considered to be a single serving, in order to compare the references to the claims.

Claim 5 is indefinite in the use of parenthesis as it is not clear what is intended. Applicants could say "sodium chloride ions in amounts of 80 mg's. Also, the claim is not clear in that it is not know how much electrolyte is required for what amount of hypotonic liquid. Last, the claim is not clear in the use of the phrase "minor amounts". It is not known what amounts would be minor.

Claims 6-10 are also indefinite in that it is not known what size a "serving" is.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stray- Gundersen (5,114,723) in view of Forusz et al. (6,761,912).

Stray- Gundersen discloses a hypotonic beverage concentrate containing the claimed ingredients, which are useful for rehydration and for providing energy. Claim 1 differs from the reference in the addition of vitamin D. However, Forusz et al. disclose that it is known to use vitamin D3 in a beverage for the function of enhancing the absorption of minerals, especially calcium (col. 3, lines 35-40, col. 4, lines 25-35, (abstract). Therefore, it would have been obvious to also use vitamin D in the beverage of Stray-Gunderson for its function as shown by Forusz et al. of enhancing the absorption of minerals.

Claim 2 further requires that the carbohydrate source is present in a concentration of 1.4 grams per single serving. However, it is not known what size a single serving is. In addition, applicants' beverage is hypotonic as is the beverage of Stray-Gundersen. Also, Stray-Gunderson discloses the use of from 0 to 8% of a carbohydrate which reads on applicants claimed amounts (col. 14, lines 22-45). Applicants' specification discloses the use of an artificial sweetener. Stray- Gunderson discloses the use of an artificial sweetener and carbohydrates which have zero amounts to various percentages (col. 14, lines 20-21). Therefore, it would have been obvious to manipulate the various ingredients to achieve a particular osmolality or particular amounts of carbohydrates in the hypotonic range.

Fructose is disclosed in col. 13, lines 20-35 as in claim 3. No patentable distinction is seen at this time in the use of crystalline fructose and the same in corn

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syrup form, or in the form of corn syrup solids, as solids are surely crystalline. Corn syrup is known to be used for its ease of use. Therefore, it would have been obvious to use known types of fructose in the composition of Stray-Gundersen.

Aspartame as in claim 4 is disclosed in col. 11, lines 5-6.

Electrolytes as in claim 5, such as potassium and sodium are disclosed in col. 7, lines 61-70, col. 8, lines 1-8. However, as in the 112 rejection, it is not known what measurement of liquid applicants are using. As applicants are also claiming a hypotonic beverage, it would have been within the skill of the ordinary worker to adjust the amounts of ions to make a hypotonic beverage. Preservatives are disclosed in col. 11, lines 56-64. Therefore, it would have been obvious to use known electrolytes in various amounts and preservatives for their known functions in the composition of Stray-Gundersen.

Stray-Gundersen (SG) discloses more than 100% of the daily requirement of vitamin C as in claim 7, the further amounts as in claims 8-10 are seen as being within the skill of the ordinary worker to determine especially as it is not known what amount a serving is. As above SG discloses the claimed vitamins and minerals. Therefore, it would have been obvious to use particular amounts of known vitamins and minerals in the claimed composition for their known use absent anything unexpected or unobvious in using the claimed amounts of ingredients.

Inulin as in claim 11 of which oligofructose is a subgroup is disclosed by Forusz in col. 9, lines 60-67. As that reference is to increasing bone density, which is a known problem in women, it would have been obvious to use inulin or a form of it in the

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claimed composition for its known use in combination with calcium to promote bone density.

Flavors and colors as in claim 12 are disclosed in col. 11, lines 33-56.


Claim 13 is to a syrup. No patentable distinction is seen between a concentrate and a syrup at this time as they both contain reduced amounts of water or liquid (col. 12, 6-20 Of SG). Therefore, it would have been obvious to use a concentrate, which is considered to be a syrup.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 8-29-06


HELEN PRATT
PRIMARY EXAMINER